DAITO KOGYO (SARAWAK) SDN BHD v PORT DICKSON LAND DEVELOPMENT SDN BHD [2001] 2 MLJ 531

Malayan Law Journal Reports · 29 pages

HIGH COURT (KUALA LUMPUR)

ABDUL MALIK ISHAK J

CIVIL SUIT NO S5-22-728 OF 1999

28 February 2001

Case Summary

Civil Procedure — Summary judgment — Appeal — Whether triable issues raised — Whether a proper case for summary judgment — Rules of the High Court 1980 O 14

The defendant was the registered proprietor of a piece of land ('the land'). By a deed of compromise, the defendant agreed to pay Safuan Daito (JV) Sdn Bhd ('SDJV') a sum of RM7,224,300. In order to secure the repayment of the sum of RM7,224,300, the defendant charged the land in favour of SDJV. By way of a deed of assignment, SDJV assigned absolutely all its rights, title and interests under the deed of compromise to the plaintiff. Pursuant to cl 3(1) of the deed of compromise the defendant consented to a transfer of the said charge over the land to the plaintiff as evidenced by the defendant's director's circular resolution. The defendant failed to repay the debt and ignored the plaintiff's letter of demand. The plaintiff applied for an order for sale of the said land vide Originating Summons No 24-459-90 ('the foreclosure proceedings'). The High Court granted the order for sale of the land. The nett proceeds of the sale of the land came up to RM11,114,975. The plaintiff claimed against the defendant the balance sum of RM5,585,086.12. The plaintiff's application for a summary judgment was allowed by the senior assistant registrar. The defendant appealed. The defendant resisted the summary judgment, on the grounds, inter alia: (i) the defendant had not at any time received a written request from SDJV for the defendant's consent to assign the principal sum of RM7,224,300 or the transfer of the said charge to the plaintiff; and (ii) the defendant agreed to execute the deed of compromise on condition that SDJV gave its assurance that its parent company namely Daito Kogyo Co Ltd will finance the reclamation project until its completion. The plaintiff submitted that both issues (i) and (ii) were similar to the ones raised by the defendant in the foreclosure proceedings and thus the doctrine of res judicata was applicable.

Held, dismissing the appeal:

(1) A perusal of the defendant's directors' resolution would clearly show that the transfer of the said charge from SDJV to the plaintiff was with the full knowledge and consent of the defendant. Further, the signatures of the signatories that appeared in the deed of assignment were the same ones as those appeared in the relevant form for the charge (Borang 16A). The signatures of these signatories conclusively showed that the defendant knew of the existence of the deed of assignment and its effect (see pp 548H, 550H, 551A). [*532]

(2) The validity of the deed of compromise was beyond question. In the absence of fraud or misrepresentation, the defendant's signatures appearing on the deed of compromise sealed the fate of the defendant once

and for all. Those signatures were sufficient to bind the defendant to the deed of compromise (see p 554C-D).

(3) The affidavits filed the respective parties in the foreclosure proceedings together with the grounds of judgment conclusively showed that the rule of res judicata should be applied to the factual matrix of the present case (see p 552A-B).

(4) This was a perfect case for summary judgment. All the documents were in favour of the plaintiff. There was no triable issue shown by the defendant to warrant a trial. The entire appeal revolved on the facts rather than the law and the defendant had failed to show a bona fide defence to the plaintiff's claim (see pp 552D, 559I).

Bahasa Malaysia summary

Defendan adalah tuan punya sekeping tanah yang berdaftar ('tanah tersebut'). Melalui satu suratikatan kompromi, defendan telah bersetuju untuk membayar kepada Safuan Daito (JV Sdn Bhd ('SDJV') wang sejumlah RM7,224,300. Bagi menjamin pembayaran balik jumlah RM7,224,300 tersebut, defendan telah mencagarkan tanah tersebut atas nama SDJV. Melalui satu suratikatan penyerahhakkan, SDJV telah menyerahhakkan secara mutlak semua hak-hak, hakmilik-hakmilik dan kepentingan-kepentingan di bawah suratikatan kompromi tersebut kepada plaintif. Menurut kl 3(1) suratikatan kompromi tersebut, defendan telah membenarkan satu pemindahmilikan terhadap cagaran ke atas tanah tersebut kepada plaintif sebagaimana yang diterangkan oleh pekeliling resolusi pengarah defendan. Defendan telah gagal untuk membayar balik hutang tersebut dan tidak menghiraukan surat tuntutan plaintif. Plaintif telah memohon satu perintah jualan ke atas tanah tersebut melalui Saman Pemula No 24-459-90 (prosiding perampasan harta tersebut'). Mahkamah Tinggi telah membenarkan perintah jualan tanah tersebut. Hasil kutipan bersih jualan tanah tersebut adalah sebanyak RM1,114,975. Plaintif telah menuntut daripada defendan baki jumlah RM5,585,086.12. Permohonan plaintif untuk satu penghakiman terus telah dibenarkan oleh penolong kanan pendaftar. Defendan telah membuat rayuan. Defendan telah menentang penghakiman terus tersebut, atas alasan-alasan, antara lain: (i) defendan tidak pada bila-bila masa menerima permintaan bertulis daripada SDJV untuk kebenaran defendan untuk menyerahhak wang pokok berjumlah RM7,224,300 atau pemindahanmilik cagaran tersebut kepada plaintif; dan (ii) defendan telah bersetuju untuk menyempurnakan suratikatan kompromi tersebut dengn syarat bahawa SDJV telah memberikan jaminannya bahawa syarikat [*533]
induknya terutamanya Daito Kogyo Co Ltd akan membiayai projek penebusgunaan sehingga ianya selesai. Plaintif telah menghujahkan bahawa kedua-dua persoalan (i) dan (ii) adalah sama seperti yang telah ditimbulkan oleh defendan di dalam prosiding perampasan harta tersebut dan oleh itu doktrin res judicata adalah terpakai.

Diputuskan, menolak rayuan tersebut:

(1) Penelitian resolusi pengarah defendan akan dengan jelas menunjukkan bahawa pemindahmilikan cagaran tersebut daripada SDJV kepada plaintif adalah dengan pengetahuan penuh dan kebenaran defendan. Tambahan pula, tandatangan-tandatangan penandatangan-penandatangan yang terdapat pada suratikatan penyerahhakkan adalah sama seperti yang terdapat pada borang berkatan tentang cagaran tersebut (Borang 16A). Tandatangan-tandatangan penandatangan-penandatangan tersebut dengan kukuh menunjukkan bahawa defendan mengetahui tentang kewujudan suratikatan penyerahakkan tersebut dan kesannya (lihat ms 548H, 550H, 551A).

(2) Kesahihan suratikatan kompromi tersebut tidak boleh dipersoalkan. Dengan ketiadaan fraud atau salah nyata, tandatangan-tandatangan defendan yang timbul atas suratikatan kompromi tersebut telah sekaligus memeteraikan takdir defendan. Tandatangan-tandatangan tersebut telah mencukupi untuk mengikat defendan kepada suratikatan kompromi tersebut (lihat ms 554C-D).

(3) Afidavit-afidavit yang telah memfailkan pihak-pihak yang berkaitan di dalam prosiding perampasan harta tersebut bersama dengan alasan-alasan penghakiman yang kukuh menunjukkan bahawa ujian res judicata hendaklah terpakai kepada faktual matrix kes sekarang ini (lihat ms 552A-B).

(4) Ini adalah kes yang bagus untuk penghakiman terus. Kesemua dokumen-dokumen menyebelahi plaintif. Tiada persoalan yang boleh dibicarakan yang ditunjukkan oleh defendan untuk mewarankan satu perbicaraan. Keseluruhan rayuan tersebut berkisar atas fakta-fakta yang lebih daripada undang-undang dan defendan telah gagal untuk menunjukkan satu pembelaan bona fide kepada tuntutan plaintif (lihat ms 552D, 559I).]

Notes

For cases on summary judgment generally, see 2(2) Mallal's Digest (4th Ed, 1998 Reissue) paras 4372-4778.

Cases referred to

Abdul v Doolanbibi (1913) 37 B 563 (refd)

Alfred Rowntree & Sons Ltd v Frederick Allen & Sons (Poplar) Ltd (1935) 41 Com Cas 90 (refd)

[*534]

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Badar Bee v Habib Merican Noordin & Ors (1909) AC 615 (refd)

Beni Pershad v Raj Kumar (1912) 16 CLJ 124 (refd)

Brunsden v Humphrey (1884) 14 QBD 146 (refd)

Danks v Farley (1853) 1 WR 291 (refd)

Dhani Ram v Bhagirashi 22 C 692 (refd)

F(W) (An Infant), Re [1969] 2 Ch 269; [1969] 3 All ER 595 (refd)

Glasgow and South-Western Rly Co v Boyd and Forrest (1918) SC 14 (refd)

Graydon, Re; Ex parte Official Receiver (1896) 1 QB 417 (refd)

Hills v Co-operative Wholesale Society Ltd [1940] 2 KB 435; [1940] 3 All ER 233 (refd)

Ho Giok Chay v Nik Aishah [1961] MLJ 49 (refd)

Hoystead & Ors v Commissioner of Taxation (1926) AC 155 (refd)

Kali v Bidhu (1912) 16 CLJ 89 (refd)

Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384 (refd)

Krishna v Bunwari (1875) 2 IA 283 (refd)

Long v Gowlett (1923) 2 Ch 177 (refd)

Macdougall v Knight (1890) 25 QBD 1 (refd)

Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266 (refd)

May, Re (1885) 28 Ch D 516 (refd)

Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh [1969] 2 MLJ 196 (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300 (refd)

ORMOMRM Manikavasagam Chetty of Teluk Anson v Thomas James McGregor of Penang [1933] MLJ 295 (refd)

Paramoo v Zeno Ltd [1968] 2 MLJ 230 (refd)

Parsotam v Narbada 26 IA 175; 21 A 505 (refd)

Penang Port Commission v Kanawagi a/l Seperumaniam (No 3) [1998] 4 CLJ 8 (refd)

Philips v Bury (1696) Holt KB 715 (refd)

Phuman Singh v Kho Kwang Choon [1965] 2 MLJ 189 (refd)

Punca Klasik Sdn Bhd v Seok Kim Leow [1996] 5 MLJ 241 (refd)

R v Middlesex JJ, ex parte Bond (1933) 2 KB 1 (refd)

SCF Finance Co Ltd v Masri & Anor (No 3) (Masri, garnishee) [1987] 1 All ER 194 (refd)

Sediperak Sdn Bhd v Baboo Chowdhury [1999] 5 CLJ 31 (refd)

Sheosagar v Sitaram 24 IA 50 (refd)

Sri Gopal v Pirthi 24 A 429 PC (refd)

Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494 (refd)

Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim [1985] 2 MLJ 225 (refd)

T Bariam Singh v Pegawai Pentadbir Pesaka, Malaysia [1983] 1 MLJ 232 (refd)

[*535]

Tac Construction & Trading v Bennes Engineering Bhd [1999] 2 CLJ 117 (refd)

Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81 (refd)

Udaiya v Katama 2 Mad HC 131 (refd)

Legislation referred to

Civil Law Act 1956

Kelantan Malay Reservations Enactment 1930s 9

National Land Code 1965ss 206(3), 243, 254, 256(3), 281

Rules of the High Court 1980O 14 r 2

PL Teh (*Teh & Assoc*) for the plaintiff.

Yip Huen Weng (*David Lingam & Co*) for the defendant.

ABDUL MALIK ISHAK J

Background

This was the plaintiff's claim against the defendant for a sum of RM5,585.086.12 as at 12 October 1999 together with interest thereon at the rate of 10%pa commencing from 13 October 1999 until full realisation thereof and costs on a solicitor - client basis. By way of encl 5, the plaintiff filed an application for summary judgment against the defendant under O 14 of the Rules of the High Court 1980 ('the RHC') and on 3 May 2000, the learned senior assistant registrar ('the SAR') by the name of Pn Hjh Wan Azizon bte Ahmad gave judgment in favour of the plaintiff. Aggrieved by the decision of the SAR, the defendant filed an appeal to the judge in chambers as seen in

encl 13.

The O 14 application in encl 5

The plaintiff's application for summary judgment was supported by the affidavit of Teh Boon Hock ('Teh') that was affirmed on 8 December 1999, as seen in encl 3. In that affidavit, Teh deposed to the following set of facts.

The defendant was, at all material times, the registered proprietor of all that piece of land held under HS(D) 8377 PT No 75 district of Port Dickson, Mukim Port Dickson, Negeri Sembilan ('the land'). By a deed of compromise dated 26 November 1986, as seen at exhibit marked as 'DK 1' of encl 3 at p 16, that was entered into between one Safuan Daito (JV) Sdn Bhd ('SDJV') and the defendant, the latter agreed to pay SDJV a sum of RM7,224,300 in the manner and in accordance to the time as stipulated in the deed of compromise. By way of a deed of assignment dated 26 November 1986, as seen in exh 'DK 2' of encl 3 at p 34, that was executed between SDJV and the plaintiff, the former assigned absolutely all its rights, title and interests under the deed of compromise to the plaintiff.

[*536]

In order to secure the repayment of the sum of RM7,224,300, the defendant charged the land in question in favour of SDJV. The charge was duly registered on 21 January 1987 as can be seen in exhibit 'DK 3' of encl 3 at p 40 thereof. As the proprietor of the land the defendant was certainly entitled to charge that land. Basically, a charge is nothing more than a transaction where the proprietor of the land pledges the land as security for the loan or for payment of an annuity or for other method of payment. The most popular form of a charge would be by way of a repayment of a loan. Under the National Land Code 1965 ('the NLC'), once a charge is registered it takes effect immediately as security in the form of a legal interest in the land. Under the Torrens system, there are several ways of effecting a charge over a piece of land. I will now endeavour to list down three of the popular ways resorted to by conveyancing lawyers:

(1) Creation of a legal charge. It envisages a situation where the chargor executes a formal instrument of charge in statutory form in favour of the chargee. Normally, the instrument and the issue document of title would be handed over to the chargee and on its registration the chargee obtains a legal charge over the chargor's land. Under the scheme of the NLC, a second, third and other subsequent legal charges may be created on the land in question.

(2) Creation of an equitable charge. It is created in the same way as the legal charge but with a difference — the instrument of charge would not be registered. But a chargee under an equitable charge is allowed to enter a caveat in order to protect his interest pending the registration of that charge. In the event the chargor defaults, the chargee is allowed to register the instrument and once it is registered the chargee can sell the land.

(3) Creation of a lien. Here there would not be any formal instrument of charge but rather the issue document of title would be deposited with the lender as a pledge. The NLC treats the lien as a security transaction where the entry of a lien-holder's caveat may be necessary (*Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196).

The registration of a legal charge would be effected in accordance with the provisions as set out in s 243 of the NLC, whereas an equitable charge would bring into sharp focus s 206(3) of the NLC. A lien, on the other hand, must comply with the terms as set out in s 281 of the NLC.

Charges and statutory liens are recognised under the NLC. A charge certainly constitutes an interest in land. This means that it renders the land liable as a security where the chargee could enforce by way of the sale of the land in the event of default by the chargor. In *Ho Giok Chay v Nik Aishah* [1961] MLJ 49, Hepworth J rightly concluded that a charge was an interest in land in that it rendered the land liable as security under the then Kelantan Land Enactment 1938 is now repealed by the NLC and that the chargee could enforce that security by way of the sale of the land. In *T Bariam Singh v Pegawai Pentadbir Pesaka, Malaysia* [1983] 1 MLJ 232, Mohamed Zahir J [*537]
(as he then was) held an opposite view. His Lordship was of the view that a charge did not amount to an interest in land under the Kelantan Malay Reservations Enactment 1930 because the chargee was not given any interest in the land as to the enjoyment and use of it. His Lordship was also of the view that it was not the intention of the legislature to prohibit the creation of charges in favour of the non-Malays but what was prohibited was that in the event of the chargee enforcing the charge by way of sale of the land, the land can never be sold to a non-Malay and in this way it would ensure that the ownership of the land remained in the hands of the Malays, In the context of the

Kelantan Malay Reservations Enactment 1930 the decision of *T Bariam Singh* was rightly decided. It must be borne in mind that s 9 of the Kelantan Malay Reservations Enactment 1930 categorically stated that a Malay reservation land can only be sold to a Malay in the event of default by the Malay proprietor under the charge. Such a provision would certainly ensure, in the long run, that ownership of Malay reservation land would remain in the hands of the Malays.

There are no provisions in the NLC which prohibit the creation of equitable charges. An equitable charge would certainly give rise to an equitable right in favour of the creditor. Salleh Abas CJ (as he then was) in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 (FC), laid down the law in a refined language. This was what his Lordship said:

> Our land law does not recognize a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, ie ownership of the land is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as equity of redemption. But our land law certainly recognizes a mortgage in the sense of Torrens system, referred to by text writer as Torrens mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security. For the purpose of avoiding confusion, our National Land Code drops the word 'mortgage' and uses the word 'charge' in place of Torrens mortgage. Thus, when s 21(1) of our Limitation Act speaks of a 'mortgage', it must mean a 'charge' as understood and provided for in Part Sixteen of our National Land Code (see *Haji Abdul Rahman & Anor v Mahomed Hassan* (1917) AC 209 at p 217). That being the case, the words 'other charge on land' in the section, in our view, must mean other types of encumbrances to which the land is subjected. These could be an equitable charge or a lien, statutory or equitable which arises as a result of depositing a title deed with the lender.
>
> The decision of the Privy Council in *Haji Abdul Rahman & Anor v Mahomed Hassan*, certainly does not prevent the creation of an equitable charge. In that case, an agreement to secure a debt by which the debtor transferred his land to the creditor and upon repayment the land would be transferred back to the debtor was held to be valueless as a transfer or burdening instrument, but was good as a contract. The right so created was not a legal right in the land but only a contractual right. The nature of this contractual right was amplified by Terrell Ag CJ in *Arunasalam Chetty v Teah Ah Poh Trading & Anor* [1937] MLJ 17 at p 21, to be a security for debt outside the provisions of the Land Code.
>
> [*538]
>
> On the other hand, if *Haji Abdul Rahman*'s case, is considered to have the effect of preventing the creation of an equitable charge, the effect of the decision cannot be extended to other cases. In that case the agreement was held void as a transfer or as a burdening instrument because it contravened s 4 of the Selangor Registration of Titles Regulation 1891. This section prohibited the transfer, transmission or the creation of any mortgage or charge, or otherwise dealt with except in accordance with the provisions of this Regulation, and 'every attempt to transfer, transmit, mortgage, charge, or otherwise deal with the same, except as aforesaid, shall be null and void and of non-effect, …' And s 41 enacted that 'whenever any land is intended to be charged or made security in favour of any person, the proprietor shall execute a charge in the form contained in Sch E, which must be registered as hereinbefore provided'.
>
> But the subsequent Land Code and the present National Land Code do not contain provisions similar to s 4 of the above quoted Regulation, although the Codes make provisions as to how a charge or a lien could be created. Examination of courts' decisions clearly show that the courts have resorted to equitable principles and consistently held that an agreement or an arrangement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien within the provisions of the National Land Code or the previous Code is executed or created. (See *Ngan Khong v Bamah bt Pakeh Jamin & Anor* [1935] FMSLR 81; *Arunasalam Chetty v Teah Ah Poh Trading*; *Vallipuram Sivaguru v Palaniappa Chetty* [1937] MLJ 59 and *Mercantile Bank v Official Assignee* [1969] MLJ 196). The basis of this ruling is the very *raison d'etre* of the court's own existence and the imputed intention of the legislature. Terrell Ag CJ in *Arunasalam Chetty*'s case said:
>
> > '… It is the duty of the courts to do justice between parties, and unless expressly prohibited by statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds …' (p 22)
> >
> > '… but it is difficult to believe that it was the deliberate intention of the Kedah legislature by the mere omission to exclude the recognition of the principle of an equitable deposit.' (p 21)

These statements were supported by Whitley Ag CJ (SS) who sat in the same case and said:

> '…the courts will recognize equitable estates and rights except so far as they are precluded from doing so by the statutes.' (p 18)

Raja Azlah Shah J (as he then was) reaffirmed this judicial attitude in *Mercantile Bank Ltd*'s case, when he said:

> '…unless there are express words in the Act, this court is not precluded from giving effect to equitable rights existing between the parties ….' (p 197)

There is, however, no provision in the National Land Code prohibiting the creation of equitable charges and liens. The Code is silent as to the effect of securities which do not conform to the Code's charge or lien. Therefore equitable charge and liens are permissible under our land law. We, therefore, think that the words 'or other charge on land' in s 21(1) of the Limitation Act must be construed to include equitable charges and liens as well.'

[*539]

The case of *Mahadevan s/o Mahalingam v Manilal & Sons (M) Sdn Bhd*, aptly laid down the principle that an agreement to secure a debt in favour of the creditor in regard to the debtor's land will invariably create an equitable charge in favour of the creditor. According to and depending on the intention and conduct of the parties, there may arise a situation where the creditor's right to a charge in equity under the agreement may arise. And that right under the contract would be preserved and recognized under sub-s (3) of s 206 of the NLC where the court, in the exercise of its equitable jurisdiction, may, in appropriate circumstances, grant the creditor specific performance of the contract in question. This the court would certainly be entitled to do and it would do by way of ordering the debtor to execute a valid and registrable document of charge.

In regard to a lien, I have this to say. There must be an intention to create a lien. Such an intention can be gathered and deduced when the issue document of title to the land has been deposited with the lender as security for the loan and for no other purpose (*Paramoo v Zeno Ltd* [1968] 2 MLJ 230 (FC)). It must be emphasized that according to the case of *ORMOMRM Manikavasagam Chetty of Teluk Anson v Thomas James McGregor of Penang* [1933] MLJ 295, the mere parting of possession with the issue document of title to the land for some intention other than that of giving up the lien would not cause the lien to be lost. And according to the case of *Mercantile Bank Ltd*, the failure to enter a lien holder's caveat will not necessarily deprive the lender of the right to a lien in equity provided that the prerequisite intention to create a lien coupled with the deposit of the title to the land are present and reflected in the facts and circumstances of the case.

Back to the mainstream of the case, it would be opportune to mention that pursuant to cl 3 (1) of the deed of compromise the defendant consented to a transfer of the said charge over the land to the plaintiff with the full knowledge and agreement of SDJV as evidenced by the defendant's directors' circular resolution dated 5 December 1986 as seen in exh 'DK 4' of encl 3 at p 57 thereof. The transfer of that charge from SDJV to the plaintiff was duly registered on 19 March 1987 as reflected at 'Borang 14B' which was exhibited and marked as exh 'DK 5' of encl 3 at p 59 thereto. On the strength of the transfer of the charge, the plaintiff as chargee became entitled to enforce the charge in question.

It would be germane, at this juncture, to reproduce the relevant terms and conditions of the charge as seen in encl 3. At p 44 of encl 3, s 1.02 of the charge annexure reads as follows:

> Section 1.02 Deed of Compromise
>
> By a Deed dated the 26 November 1986 (hereinafter called 'the Deed of Compromise') and made between the chargor and SDJV, the chargor agreed to pay to SDJV, the sum of M$7,224,300 (hereinafter called the Indebtedness) at the times and in the manner therein stated and upon the terms and subject to the conditions contained therein.

[*540]

Section 1.03 of the charge annexure at p 44 of encl 3 reads as follows:

Section 1.03 Execution of Charge Under the National Land Code

By the Deed of Compromise, it was agreed, inter alia, that the Indebtedness interest thereon and all other moneys owing and payable by SDJV under the terms of the Deed of Compromise should be secured by this Charge.

Section 8.02 of the charge annexure at p 52 of encl 3 reads as follows:

Section 8.02 Late Payment

In the event of default by the chargor in the payment on due date of any sum (whether (as) principal, interest or otherwise) due to SDJV under this charge the chargor will on demand pay to SDJV interest on such sum from the date of such default up to the date of receipt by SDJV (as well after as before judgment) at the rate of ten percent (10%) per annum.

At p 53 of encl 3, s 9.04 of the charge annexure reads as follows:

Section 9.04 Costs

The chargee shall be liable to pay all fees and expenses in connection with or incidental to this Charge including SDJV's solicitors' fees (on a solicitor and client basis) in connection with the preparation and execution of this Charge and the documents related thereto. If the moneys hereby secured or any part thereof shall be required to be recovered through any process of law, or if the moneys hereby secured or any part thereof shall be placed in the hands of the solicitors for the collection, the chargor shall pay (in addition to the moneys then due and payable and hereby secured) SDJV's solicitors' fees (on a solicitor and client basis) and any other fees and expenses incurred in respect of such collection.

Finally, at p 54 of encl 3, s 9.06 of the charge annexure reads as follows:

Section 9.06 Notices

A demand for payment of moneys or any other demand or notice to the chargor under this Charge may be made by the Director, Manager, Secretary, Accountant or other officer for the time being of SDJV or by any person or firm for the time being acting as solicitor or solicitors for SDJV by letter addressed to the chargor and sent by post to or delivered at the address of the chargor hereinbefore stated or to such other address as may from time to time be notified by the chargor to SDJV for such purpose and any and every demand and notice sent by post shall be deemed to have been made or given 48 hours after the letter was posted in the States of Malaya and notwithstanding the fact that the letter may be returned to the post office.

I will now proceed to reproduce in verbatim the relevant terms and conditions of the deed of compromise. Clause 1(1) of the deed of compromise at p 18 of encl 3 reads as follows:

1 PAYMENT OBLIGATIONS

(1) In consideration of the premises PDLD shall pay or cause to be paid to SDJV the Principal Amount at the times and in the following manner:

IN ONE LUMP SUM ON OR BEFORE 31ST AUGUST 1988.

[*541]

While cl 1 (2) of the deed of compromise at p 18 to p 19 of encl 3 reads in this way:

(2) to pay interest on the Principal Amount at the rate of 10% pa calculated on a yearly basis from 1 January 1986 to the date of full repayment, both dates inclusive; such interest to be paid together with the payment specified in cl 1(1)(a) hereof.

Teh proceeded further to depose that the defendant failed to repay the debt with interest thereon on or before 31 August 1988. This prompted the plaintiff's solicitors to make a demand on the defendant for the payment of the debt

that came to RM7,224,300 together with interest thereto. That letter of demand was dated 8 June 1990 and it was exhibited as exhibit 'DK 6' of encl 3 at p 64 and it was worded as follows:

> We act for Daito Kogyo (Sarawak) Sdn Bhd, the chargee of the above captioned land.
>
> On our client's instructions, we give you notice that you are in default of:
>
> > (a) Clause 1 of the Deed of Compromise (dated 26th November 1986) made between you and Safuan Daito (JV) Sdn Bhd, the benefit of which Deed (together with the said charge) has been assigned and transferred (respectively) to our client; and
> >
> > (b) Section 3.01 of the Annexure to the said Charge.
>
> On our client's instructions we hereby give you notice to remedy the said breach by paying to us or to our client the sum of M$7,224,300 together with interest thereon at the rate of 10% per annum (with yearly rests) from 1 January 1986 to the date of full payment: such payment to be received by us or our client within seven days of the receipt of this letter.
>
> Please be informed that in default of your compliance to the demand aforesaid, our client shall proceed with legal action to obtain an Order of Court for the sale of the said land.

The defendant refused to pay and it ignored the letter of demand. On 26 October 1990, the plaintiff then caused a notice to be issued and that notice was a notice under s 254 of the NLC. That notice can be seen at p 67 of encl 3 and it was marked as exh 'DK 7' and it was worded in this way:

> NATIONAL LAND CODE
>
> FORM 16D
>
> (SECTION 254)
>
> NOTICE OF DEFAULT WITH RESPECT TO A CHARGE
>
> To: PORT DICKSON LAND DEVELOPMENT SDN BHD
>
> No 7 Jalan Raja Abdullah
>
> 50300 KUALA LUMPUR
>
> Chargor under the Charge described in the schedule below of the land so described.
>
> WHEREAS you have committed a breach of the provision in this Charge by failing to pay the sum due to the chargee of M$7,224,300 as at the 31 August 1988 in accordance with the terms thereof and interest thereon at the rate of 10% pa with yearly rests from the 1 January 1986 and continuing.
>
> [*542]
>
> AND WHEREAS, the breach has continued for a period of seven (7) days prior to the date of this Notice.
>
> We, as chargee, by virtue of the powers conferred by s 254 of the National Land Code, hereby require you within the period of seven (7) days from the service of this Notice to remedy the breach failing which we shall apply for an Order for Sale.
>
> Dated this 26 October 1990
>
> Sgd (Illegible)
>
> ……

Messrs Teh & Associates

Solicitors for the chargee

The defendant remained stubborn and refused to comply with the said notice.

On 15 November 1990 the plaintiff applied for an order for sale of the land in question pursuant to s 256 of the NLC in the Seremban High Court vide Originating Summons No 24-459-90. Mohd Noor bin Haji Abdullah J sitting in the Seremban High Court granted the order for sale of the land on 9 October 1995 as seen in exh 'DK 8' at p 70 of encl 3. Aggrieved by the order for sale of the land in question, the defendant had, on 7 November 1995, appealed to the Court of Appeal vide Civil Appeal No N-02-720-95. Section 256 of the NLC enacts as follows:

> Application to Court for order for sale.
>
> This section applies to land held under —
>
> (a) Registry title;
>
> (b) the form of qualified title corresponding to Registry title; or
>
> (c) subsidiary title,
>
> and to the whole of any divided share in, or any lease of, any such land.
>
> (2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.
>
> (3) On any such application, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

and it gives the power to the court to make an order for sale. But there are certain circumstances where an order for sale would not be granted and these circumstances may conveniently be listed in the following ways:

(1) where the chargee has been fraudulent or where the chargee and chargor have acted in collusion to defraud third parties (*Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 (FC));

(2) In cases where non-compliance with the requirements of the Moneylenders Ordinance 1951 existed (*Phuman Singh v Kho Kwang Choon* [1965] 2 MLJ 189 (FC));

(3) 'existence of cause to the contrary' — borrowing the words of sub-s (3) to s 256 of the NLC. The phrase covers a whole gamut of [*543]

situations. It would cover those cases where the chargees are guilty of any unreasonable conduct and where the rights of innocent third parties would be affected by the granting of the order for sale (*Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 (FC)). Salleh Abas CJ (Malaya) (as he then was) in *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors*, in a style of his own, aptly said (see p 388 of the report):

> The phrase 'cause to the contrary' used by the National Land Code and 'cause be shown to the satisfaction of the court' used by the FMS Land Code, in our view, convey the same meaning and bear the same concept. What then is the meaning of the phrase 'cause to the contrary' and how should the court proceed to determine its meaning?

In *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296 Aitken J who sat with McElwaine CJ (SS) and Murray-Aynsley J to form the FMS Court of Appeal said:

> '… Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'shew cause' either in law or equity against an application for an order for sale, and that the courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States'.

At p 389 of the report, his Lordship continued in serious vein:

> From the review of the above cases, we are of the opinion that the court has not only to apply the law but also invoke the aid of equity in order to be satisfied as to whether 'a cause to the contrary' has been shown or not. The chargee must not only come to court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of 'innocent third parties' to be affected by the order.

So much for the law and now back to the facts. Since there was no stay of the order for sale of the said land, the land was eventually sold by public auction on 8 March 1997 at the rate of RM11.4m. The contract of sale as exhibited in exhibit marked 'DK 9' of encl 3 at p 75 thereof was worded in this way:

KONTREK

> MEMORANDUM;— Dalam jualan dengan Lelong Awam pada 8 Mac 1997, mengenai harta yang terkandung dalam butir-butir yang tersebut diatas No Hakmilik HS(D)8377, No PT 75, Mukim dan Daerah Port Dickson, Negeri Sembilan penawar tertinggi dan diisytiharkan sebagai pembeli harta tersebut bagi jumlah wang sebanyak RM11,400,000 telah membayar kepada Penolong Kanan Pendaftar, Mahkamah Tinggi, Seremban sebagai wakil bagi penjual untuk jumlah wang sebanyak RM1,140,000 sebagai wang deposit dan bersetuju membayar baki harga pembelian dan menyempurnakan pembelian tersebut dan Penolong Kanan Pendaftar, Mahkamah Tinggi, Seremban mengaku menerima wang deposit tersebut.
>
> [*544]

TANDATANGAN PEMBELI

HARGA PEMBELIAN: RM11,400,000

DEPOSIT: RM 1,140,000

BAKI: RM10,260,000

Sgd (Illegible)

……	Add: TIVOLI VILLAS
ANWAR TAN BIN ABDULLAH	APT, ID-7-1
I/C: 580209-10-5369	JLN MEDANG TANDUK
	BUKIT BANDARAYA
TANDATANGAN	59100 KL

PENOLONG KANAN

PENDAFTAR, TANDATANGAN

MAHKAMH TINGGI, PELELONG BERLESEN

SEREMBAN. Sgd. (Illegible)

……

Sgd (Illegible)

…… TANDATANGAN

Penolong Kanan Pendaftar, PEGUAM

Mahkamah Tinggi,

Seremban. Sgd (Illegible)

S 158 ……

Miss PL Teh.

By 8 March 1997, the defendant owed the plaintiff a sum of RM15,299,680.80. The nett proceeds of the sale of the land in question came up to RM11,114,975 after deducting the court commission of RM285,025. The statement of accounts and the payment voucher emanating from the Seremban High Court can be seen in exh 'DK 10' at p 77 of encl 3.

It must be emphasized that in the process of enforcing the charge, the plaintiff incurred expenses in the sum of RM25,137.63. The plaintiff acted prudently by exhibiting the relevant documents in encl 3 thereto and these documents may be itemized in this way:

(1) the valuer's bill and official receipt for the auction as seen at exh 'DK 11' of encl 3 at pp 81-82;

(2) the auctioneer's bill and official receipt as reflected at exh 'DK 12' at p 84 to p 86 of encl 3;

(3) the valuer's bill and official receipt for the auction at exh 'DK 13' of encl 3 at pp 88-89; and

(4) the auctioneer's bill and official receipt as seen at exh 'DK 14' at p 91 to p 93 of encl 3.

The appeal by the defendant to the Court of Appeal against the order for sale of the said land as ordered by the Seremban High Court was withdrawn on 14 June 1999. The order from the Court of Appeal was extracted and it was exhibited as exh 'DK 15' at p 95 of encl 3.

On the strength of the matters as alluded to above, it was the stand of the plaintiff that the defendant was justly and truly indebted to the plaintiff to the tune of RM5,585,086.12 as at 12 October 1999. The plaintiff's solicitors by letter dated 12 October 1999 made a formal demand to the [*545]
defendant to pay the sum of RM5,585,086.12 as seen in exh 'DK 16' at pp 98-100 of encl 3 and that letter of demand was quite thorough and it was worded in this way:

TBE/2439/90(PL:G) 12 October 1999

AR REGISTERED

M/s Port Dickson Land Development Sdn Bhd

Tingkat 24, Menara Safuan

No 80, Jalan Ampang

50450 Kuala Lumpur

Dear Sirs,

Re: Land held under HS (D) 8377 PT No 75

District of Port Dickson, Negeri Sembilan

We act for Daito Kogyo (Sarawak) Sdn Bhd who was at all material times the chargee of the above captioned land.

Our instructions are that by a Deed of Compromise dated 26 November 1986 entered into between yourselves on the one part and Safuan Daito (JV) Sdn Bhd on the other part, you agreed amongst other things to pay to the said Safuan Daito (JV) Sdn Bhd a sum of RM7,244,300 at the times and in the manner specified in the said Deed of Compromise. Further in accordance therewith you executed and created a charge over the said land to secure the payment of the said sum of RM7,244,300 together with interest thereon, same of which was registered on 21 January 1987 vide Presentation No: 437/87 Jilid 583 Folio 9.

In accordance with the terms of the said Deed of Compromise, you had consented to a transfer of the said charge to our client and on 19 March 1987, a Transfer of Charge dated 11th March 1987 was duly registered vide Presentation No: 1933/87 Jilid 1152 Folio 17 being a Transfer of Charge of the said charge from Safuan Daito (JV) Sdn Bhd to our client.

Our client's further instructions are that in breach of the Provisions of the said Deed of Compromise you failed, refused and/or neglected to repay the said debt of RM7,224,300 together with interest thereon on or before 31 August 1988 although demands therefor had been made: as a consequence of which our said client proceeded to apply to the Seremban High Court for an Order For Sale of the said land pursuant to s 256 of the National Land Code vide Originating Summons No 24-459-90 on 15 November 1990 after having served on you a Notice in Form 16D dated 26 October 1990 and you had failed to remedy the breach in respect of the said charge within seven (7) days of the receipt of the said Form 16D.

An Order For Sale was made on 9 October 1995 and the said land was sold by public auction pursuant thereto on 8 March 1997 at RM11,400,000.

On our client's instructions, we now demand payment from you within seven (7) days from the date hereof, of the sum of RM5,585,086.12 being the balance debt due and owing by you to our client as at 12 October 1999; in default of which we shall institute legal proceedings against you for recovery of same, plus interest and costs on a solicitor-client basis without further reference. Particulars of the sum of RM5,585,086.12 (as at 12 October 1999) are as follows:

[*546]

1	Principal sum	…	RM 7,224,300
2	Interest thereon at 10%pa from 1 January 1986 to 9 October 1995 (date of order for sale)	…	RM 7,058,041.10
3	Interest thereon at 10%pa from 10 October 1995 to 8 March 1997 (date of public auction)	…	RM 1,017,339.70
4	Further interest on RM7,224,300 at 10%pa from 9 March 1997 to 3 November 1997 (date of receipt of proceeds from public auction)	…	RM 473,043.18
Less			
Nett proceeds from sale			(RM 11,114,975)
			RM 4,657,748.98
5	Interest on RM4,657,748.98 at 10%pa from 4 November 1997 to	…	RM 902,199.51

12 October 1999 (707 days) and such interest is still continuing at the rate of RM1,276.09 per day

6 Other expenses incurred in respect of collection of moneys secured by the charge (s 9.04 of the charge document)

A Public auction on 22 March 1996

(i) Valuation Report (Vigers (KL) Sdn Bhd) Bill No: 0237 dated 7 November 1995 Official Receipt No: 01216 dated 13 February 1996	…	RM 8,700
(ii) Auctioneer's fees (Raine & Horne Zaki + Partners Sdn Bhd)Bill No: S/207/96 dated4 April 1996Official Receipt No: 3697 dated25 May 1996	…	RM 4,244.70

B Public auction on 8 March 1997

(i) Valuation Report (Vigers (KL) Sdn Bhd) Bill No: 0721 dated 26 September 1996 Official Receipt No: 01580 dated 25th October 1996	…	RM 8,070
(ii) Auctioneer's fees (Raine & Horne International Zaki + Partners Sdn Bhd) Bill No: S/256/97 dated 28 March 1997 Official Receipt No: 4727 Dated 21 June 1997	…	RM 4,122.93
		RM 5,585,086.12

[*547]

Thank you.

Yours faithfully,

Sgd (Illegible) 12/10

cc client (By Fax only No 00-813-3681-7020)

/sal

and the AR registered card at exh 'DK 16' of p 101 showed that the defendant had received the letter of demand from the plaintiff's solicitors. It was the stand of the plaintiff, pure and simple, that there was no defence on the part of the defendant and for these reasons the plaintiff urged this court to dismiss the appeal in encl 13 with costs.

Before the learned SAR, the defendant resisted the summary judgment application and in doing so, the defendant filed two affidavits, namely:

(1) the affidavit in reply by Dato' Haji Mat $ Mat Shah bin Ahmad $ Sapuan affirmed on 17 February 2000 as seen in encl 7; and

(2) the affidavit in reply of Dato' Haji Mat $ Mat Shah bin Ahmad $ Sapuan that was affirmed on 15 March 2000 as seen in encl 10.

These two affidavits of Dato' Mat Shah were quite interestingly worded and the issues that were canvassed in these two affidavits may conveniently be summarized in these words:

(1) that the defendant had not at any time received a written request from SDJV for the defendant's consent to assign the principal sum of RM7,224,300 or to transfer the said charge to the plaintiff (see paras 6 and 8 of encl 7 and paras 6 and 7 of encl 10; and the following points were used to bolster up this argument:

(a) that under the NLC, the chargor was not obliged to the chargee unless the chargor has been notified of the transfer of the charge (see para 10 (a) of encl 7);

(b) that the principal sum had not, at any time, been assigned by SDJV to the plaintiff and that being the case the defendant was said not to owe the plaintiff (see paras 10 (c), 11 and 12 of encl 7);

(c) that the creation of the said charge for the benefit of the plaintiff was unsupported by any consideration (see para 10 (d) of encl 7); [*548]

(d) that the obligations of the defendant under the charge and the deed of compromise were to pay SDJV and not the plaintiff (see para 10(e) of encl 7);

(2) that the defendant agreed to execute the deed of compromise on condition that SDJV gave its assurance that its parent company, namely, Daito Kogyo Co Ltd will finance the reclamation project at Port Dickson until its completion (see para 13 of encl 7). It was averred that since SDJV had failed to ensure such financing by Daito Kogyo Co Ltd, the defendant was thereby released from its obligations under the deed of compromise and the charge thereto (see para 14 of encl 7);

(3) That the plaintiff had unfairly imposed compound interest contrary to the Civil Law Act 1956 (see para 19 of encl 7).

The plaintiff responded to Dato' Mat Shah's two affidavits by filing two affidavits through Teh as seen in encl 8 that was affirmed on 1 March 2000 and another affidavit also affirmed by Teh on 30 March 2000 as seen in encl 11.

As alluded to earlier, the two affidavits affirmed by Dato' Mat Shah in encls 7 and 10 raised three issues itemized as (1) to (3). I will now proceed to examine these issues separately.

Issue (1)

Teh affirmed an affidavit in encl 11 by way of a rebuttal and there Teh deposed that the defendant had indeed consented to, not only, the creation of the charge over the said land but also the subsequent transfer of the said charge by SDJV to the plaintiff. Indeed what Teh had deposed to in encl 11 was supported by the defendant's directors' resolutions as seen in exhs 'BH-A' and 'BH-B' of encl 11 at pp 13 and 15 respectively and by the directors' resolutions emanating from SDJV as seen in exhs 'BH-C' and 'BH-D' of encl 11 at pp 17 and 19 respectively.

Teh also deposed in encl 11 to the effect that the signatories to SDJV's resolutions in exhibits 'BH-C' and 'BH-D' were the same as the charge in Borang 16A which was signed on behalf of the defendant as seen in exh 'DK 3' of encl 3 at p 40 thereof. Incidentally these two signatories were also the same with the signatory that appeared in Borang '14B' which was signed on behalf of SDJV as seen in exh 'DK 5' of encl 3 at p 59 thereto.

A perusal of exhs 'BH-B' and 'BH-C' of encl 11 would clearly show that the transfer of the said charge from SDJV to the plaintiff was with the full knowledge and consent of the defendant and this very fact was alluded to at para 5 of encl 11. I must reproduce exh 'BH-B' at p 15 of encl 11 which came from the defendant and it was worded as follows:

Extract of the Directors Circular Resolution dated 5 December 1986 Resolved:

(i) That the Company be and hereby create a Charge under the National Land Code over all that piece of land held under HS(D) 8377 PT No 75 [*549]
Bandar Port Dickson in favour of Safuan Daito (JV) Sdn Bhd to secure the payment of the sum of $7,224,300 in accordance with the provisions of the Deed of Compromise entered into with the said Safuan Daito (JV) Sdn Bhd and that the said Safuan Daito (JV) Sdn. Bhd may be at liberty to transfer that said Charge to Daito Kogyo (Sarawak) Sdn Bhd.

(ii) That the Common Seal of the Company be affixed onto the relevant documents required in the presence of two Directors or in the presence of one Director and the Secretary of the Company.

……

DIRECTOR

Sgd (Illegible)

……

SECRETARY

and I must also reproduce exh 'BH-C' at p 17 of encl 11 which came from SDJV and it was phrased in this way:

> Extract of the Directors' Circular Resolution dated 5 December 1986. Resolved:
>
> (i) That the Company be and is hereby authorized to effect a transfer of the Charge in the Company's favour over the land held under HS (D) 8377 PT No 75, Bandar Port Dickson to Daito Kogyo (Sarawak) Sdn Bhd.
>
> (ii) That the Common Seal of the Company be affixed onto all relevant documents in the presence of two Directors or a Director and the Secretary of the company.
>
> CERTIFIED TRUE COPY
>
> Sgd (Illegible)
>
> ……
>
> DIRECTOR
>
> Sgd (Illegible)……
>
> SECRETARY

These documents as reproduced were self-explanatory and they conveyed the message that the defendant really knew what was happening.

It was contended on behalf of the plaintiff that the relevant provision of the NLC relied upon by the defendant was inapplicable as the defendant had not made any payment of the moneys due under the said charge whether before or after the transfer of the charge from SDJV to the plaintiff. At para 6 (i) of the affidavit affirmed by Teh as seen in encl 11, it was deposed that the defendant knew fully well about the transfer of the charge to the plaintiff.

Replying to the defendant's allegation that there was no assignment by the principal sum of RM7,224,300 by SDJV to the plaintiff, Teh deposed, on behalf of the plaintiff at para 6 (ii) of encl 11, that such an allegation was without any basis whatsoever in view of exh 'DK 2' as seen at p 34 of encl 3. Exhibit 'DK 2' of encl 3 was a deed of assignment dated [*550]
26 November 1986 between SDJV and the plaintiff. In that deed of assignment SDJV was referred to as the assignor while the plaintiff was referred to as the assignee.

The relevant provisions of the deed of assignment would be Preamble 1, Preamble 2 and Preamble 3 and they were worded in this way (see p 35 to p 36 of encl 3 at exh 'DK 2'):

> Preamble 1
>
> The Assignor is indebted to Daito Kogyo Co Ltd, a Company incorporated in Japan, with an office at 6-38 Kameido I-Chone Koto-Ku, Tokyo, Japan in the sum of Yen 836,973,499 as is agreed to and evidenced by a confirmation MS1,024,929.41 dated 20 November 1986 between the Assignor and Daito Kogyo Co Ltd, (hereinafter referred to as 'the Assignor-Daito Kogyo Co Ltd Deed') as at 30th September 1986.

Preamble 2

As at the date of this Agreement and the Assignor hereby warrants and represents that there is the sum of M$7,224,300.00 due and owing to SDJV by Port Dickson Land Development Sdn Bhd, a Company incorporated in Malaysia with its registered office at Bangunan Safuan, No 7 Jalan Raja Abdullah, Kuala Lumpur (hereinafter referred to as 'the PDLD monies') as agreed to and evidenced by a Deed of Compromise dated 26 November 1986 and made between the assignor and PDLD (hereinafter referred as 'the Assignor-PDLD Deed').

Preamble 3

It is a term and condition of the Assignor-Daito Kogyo Co Ltd Deed that the Assignor will consent to an assignment of all its rights title and benefit in and under the Assignor-PDLD Deed to such body or corporation as Daito Kogyo Co Ltd may designate. Daito Kogyo Ltd, has designated the Assignee herein to accept such assignment.

While cll 1 and 3 of the deed of assignment were worded in this fashion (see p 36 of encl 3 at 'DK 2'):

1 In pursuance of the agreement between the assignor and Daito Kogyo Co Ltd, and in consideration of the assignment herein contained, the Assignor HEREBY ASSIGNS unto the Assignee all the PDLD monies and all the Assignor's right title and interest in and under the Assignor-PDLD Deed to the Assignee TO HOLD unto the Assignee absolutely.

3 The Assignor warrants to the Assignee that the Recital (2) hereof is accurate in all respects and that the Assignor shall cause PDLD to sign and execute an acknowledgment that the PDLD monies are in truth and in fact owing to the Assignor.

It would be pertinent to point out that at p 5 of the deed of assignment (equivalent to p 37 of encl 3), the signatures of the signatories that appeared thereto were the same ones as those that appeared at Borang 16A which was the relevant form for the charge and that Borang 16A can be seen at exhibit 'DK 3' at p 40 of encl 3. Dato' Mat Shah's signature appearing in the deed of assignment at p 37 of encl 3 above the word 'director' was similar to his own signature that appeared at p 41 of the Borang 16A of encl 3 above the [*551]
word 'pengarah'. Shikha Dutt's signature in his capacity as a director/secretary that appeared in the deed of assignment at p 37 of encl 3 was an exact replica to the signature of his that appeared at p 41 of Borang 16A of encl 3. The signatures of these signatories conclusively showed that the defendant knew of the existence of the deed of assignment and its effect thereto. The damning feature in regard to Borang 16A at p 41 of encl 3 was this: it showed the signatures of Dato' Mat Shah and Shikha Dutt against their respective names — an inescapable conclusion that those signatures were theirs and no one else.

Issue (2)

Teh deposed in encl 11 at para (iii) thereof to the effect that the defendant's allegation that it had executed the deed of compromise on condition that it was wholly untrue was inconsistent and against the express terms of the deed of compromise and the said charge. In fact, Teh deposed at para 7 of encl 11 that both issues (1) and (2) were similar to the ones raised by the defendant in the foreclosure proceedings that was filed by the plaintiff against the defendant vide Originating Summons No 24-459-90 in the High Court at Seremban. Since the issues have been finally adjudicated upon, the doctrine of res judicata was said to be applicable.

Now, res judicata or a plea of former judgment is a growing doctrine that sees its development moulded through the years by judges from all over the world. In England as well as in America, the plea of res judicata is usually dealt with under the category of the law of evidence. In India, res judicata is considered to be procedural in nature. Once the court is satisfied that the ground of legal right on which the plaintiff sues was finally dealt with by the judgment of the court, then the plea of res judicata would come into play (*Udaiya v Katama* 2 Mad HC 131 which was affirmed on appeal vide 10 WR1 PC; *Parsotam v Narbada* 26 IA 175, 21 A 505; *Dhani Ram v Bhagirashi* 22 C 692; and *Sheosagar v Sitaram* 24 IA50). Bowen LJ in *Brunsden v Humphrey* (1884) 14 QBD 146 aptly said that:

The rule of the ancient common law is that when one is barred in any action, real or personal, by judgment, demurrer, confession or verdict, he is barred as to that or the like action of the like nature, for the same thing forever.

The rule of res judicata is founded upon the maxim nemo debet bis vexari pro una et eadem causa (no person should be twice vexed for the same course) — a maxim which is itself an outcome of the wider maxim *interest reipublicae ut sit finis litium*. Bluntly put, a matter which has been put in issue, tried and determined by a court of competent jurisdiction cannot be re-opened between those who were parties to such adjudication. It is essential that the court must be competent (*Abdul v Doolanbibi* (1913) 37 B 563). The crucial test would be not whether the decision was explicit but rather whether the issue was an issue upon which the judgment of the former suit was based (*Sri Gopal v Pirthi* 24 A 429 PC, *Kali v Bidhu* (1912) 16 CLJ 89; *Beni Pershad v Raj Kumar* (1912) 16 CLJ 124). Res judicata would also be [*552]
applied to the grounds of decision as well as to the decision itself (*Krishna v Bunwari* (1875) 2 IA 283).

Indeed the affidavits filed by the respective parties in the foreclosure proceedings as seen in exhs 'BH-E' to 'BH-K' at pp 21-98 of Teh's affidavit in encl 11 together with the certified true copy of the grounds of judgment of Mohd Noor bin Haji Abdullah J dated 9 October 1995 as seen in exh 'BH-L' at p 100 of Teh's affidavit in encl 11 conclusively showed that the rule of res judicata should be applied to the factual matrix of the present case. This was my judgment and I so hold accordingly.

Issue (3)

In regard to the issue of compound interest that was raised by the defendant, Teh deposed at para 8 of encl 11 that there was no calculation of interest upon interest as alleged by the defendant. In encl 11 at para 8 too, the particulars of the calculation of the various interest components were set out in minute detail. And at para 9 of encl 11, Teh in his deposition reiterated that there was no defence to the plaintiff's claim and for that reason Teh sought for summary judgment against the defendant.

In my judgment, this was a perfect case for summary judgment. All the documents were in favour of the plaintiff. There was no triable issue shown by the defendant to warrant a trial (*Punca Klasik Sdn Bhd v Seok Kim Leow* [1996] 5 MLJ 241). In *Penang Port Commission v Kanawagi a/l Seperumaniam (No 3)* [1998] 4 CLJ 8, Abdul Malek Ahmad JCA (now FCJ) at p 15 of the report had this to say:

> We had analysed the affidavits and carefully considered the arguments of both learned counsel. We had also gone through the judgment of the learned trial judge. It was his finding that the statement of defence was a bare denial and the appellant cannot improve on his pleadings through affidavit evidence. With respect to the learned trial judge, we are of the view that in an application for summary judgment, O 14 r 4 (1) of the Rules of the High Court 1980 (hereinafter 'the Rules') applies and it is to the effect that a defendant may show cause against the application of affidavit or otherwise to the satisfaction of the court. That means that cause against the application can be shown by affidavit or in a statement of defence. Just as a statement of defence can be improved upon by amendment, it is an even stronger reason under the rule for the statement of defence to be clarified through an affidavit.

Now, the crucial question to pose would be: whether the defendant here had shown by affidavit or in their statement of defence cause against the application for summary judgment to the satisfaction of this court? It must be recalled that the learned counsel for the defendant in advancing his arguments pertaining to:

(1) the purported failure of the plaintiff to prove that the plaintiff was entitled to receive the assignment of the debt from Daito Kogyo Company Ltd; and

(2) the validity of the deed of compromise was questionable.
[*553]

made no reference at all to the affidavits filed by the defendant in resisting the plaintiff's summary application. This approach adopted by the learned counsel for the defendant was hardly surprising. There was, in fact, nothing in the affidavit evidence of the defendant which could support the learned counsel for the defendant's arguments in countering the O 14 application. It was an argument made in futility and out of sheer desperation. It was also an exercise of mere semantics devoid of merit.

It must be emphasized that even though the defendant had entered an appearance on 18 November 1999, yet the defendant saw it fit not to file the statement of defence. Without the statement of defence, the speech of Malek Ahmad JCA (now FCJ) in *Penang Port Commission v Kanawagi Seperumaniam (No 3)* (supra) about the need to refer to the statement of defence in order to show cause against the application for an O 14 cannot be invoked in favour of the defendant. There was no statement of defence for this court to peruse upon. The plaintiff here just like

the plaintiff in *Punca Klasik Sdn Bhd v Seok Kim Leow* had fulfilled all the three requirements of an O 14 application as laid down by Seah FJ in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, at p 301 (FC) in that:

(1) the defendant had entered an appearance;

(2) the statement of claim had been served on the defendant; and

(3) the affidavit in encl 3 deposed to by Teh had complied with the requirements by O 14 r 2 of the RHC.

and so I had no choice but to shift the onus onto the defendant for the defendant to satisfy me why judgment should not be entered against the defendant. But alas, the defendant had failed to discharge that onus.

In regard to the defendant's allegation that it had executed the deed of compromise on condition that SDJV was to ensure that its parent company, Daito Kogyo Co Ltd will finance the reclamation project at Port Dickson until completion, Nobuyuki Suzuki affirmed an affidavit on 5 April 1991 as seen at p 39 of encl 11 and at para 6 thereto he deposed the following pertinent points:

> With regard to para 20, 21 and 22 of the defendant's affidavit, I state that the allegations therein is totally untrue and made as an afterthought. SDJV is owned 51% by Safuan Holdings Sdn Bhd and 49% by Daito Kogyo Co Ltd and I challenge the defendant to dispute this. It is obvious from the terms of the deed of compromise between SDJV and the defendant that such a term was never part of the bargain and in fact such a term if at all breached would run counter to the arrangements embodied in the deed of compromise.

and when Nobuyuki Suzuki affirmed this affidavit it was done in relation to the foreclosure proceedings that was filed by the plaintiff. When Nobuyuki Suzuki referred to 'para 20, 21 and 22 of the defendant's affidavit', he was in fact referring to the affidavit of Mohd Shamlan bin Ahmad that was affirmed on 7 February 1991 as exhibited in exhibit 'BH-E' of encl 11 at p 21 to p 26 thereof. This was what Mohd Shamlan bin Ahmad said in his affidavit that was affirmed on 7 February 1991:

[*554]

> 20 Saya juga menyatakan di dalam ini bahawa defendan bersetuju menandatangani deed tersebut dengan syarat SDJV akan memastikan syarikat induk (parent company) SDJV iaitu Daito Kogyo Co Ltd ('DKC') of Japan akan membiayai projek penebusan tanah di Port Dickson sehingga selesai.
>
> 21 SDJV telah gagal memenuhi obligasinya dengan memastikan bahawa DKC membiayai projek ini sehingga selesai.
>
> 22 Oleh kerana SDJV, parti dengan mana defendan telah menandatangai deed tersebut telah mengingkari obligasinya, defendan tidaklah terikat dengan dan adalah dilepas dari terma-terma deed tersebut.

Nobuyuki Suzuki's affidavit silenced the averments of Mohd Shamlan bin Ahmad. Indeed it was an erroneous assumption on the part of the defendant that the plaintiff was holding a 49% stake of SDJV.

Next, going on an uphill task, the defendant, on a low key, questioned the validity of the deed of compromise as seen in exhibit marked as 'DK-1' of encl 3. To me, the validity of the deed of compromise was beyond question. In the absence of fraud or misrepresentation, the defendant's signatures appearing on the deed of compromise sealed the fate of the defendant once and for all. Those signatures were sufficient to bind the defendant to the deed of compromise. In *Tac Construction & Trading v Bennes Engineering Bhd* [1999] 2 CLJ 117, at p 145, I had occasion to say something about the value of a signature that appears in a document and this was what I said:

> Of crucial importance, in so far as the exhibits in 'TAC 2' and 'TAC 3' of encl 6 are concerned, would be the signatures of the project manager found therein and the defendant did not dispute these signatures at all. I must say something about signatures generally. The case of *Geary v Physic* (1826) 5 B & C 234 establishes beyond doubt that even a signature by pencil is sufficient. The signature appearing on a telegraph form can even be considered to be sufficient and this found favour in at least three old vintage cases. Firstly, *Godwin v Francis* (1870) LR 5 CP 295. Secondly, *Mc Blain v Cross* (1872) 25 LT 804. Thirdly, *R v Riley* (1896) 1 QB 309 at p 313. Then there is the principle that a signature by means of a mark is also considered as sufficient (*Baker v Dening* (1838) 8 A & E 94 (signature of a will), and *Dyas v Stafford* (1881) 7 LR Ir

590). Signatures by initials have also been considered to be clearly sufficient (*In the Goods of Blewitt* (1879) 5 PD 116 (signature of will); *Phillimore v Barry* (1818) 1 Camp 513; *Chichester v Cobb* (1866) 14 LT 433; and *Hill v Hill* (1947) Ch 231, at p 240).

It must be emphasized, and this was certainly in favour of the plaintiff, that there was no affidavit evidence emanating from the defendant, whether it was in the present proceedings or in relation to the earlier foreclosure proceedings, to show that the signatures of the defendant that appeared in the deed of compromise have been procured by unlawful means. That being the case, the validity of the signatures of the defendant that appeared in the deed of compromise can never be challenged.

Reverting back to the doctrine of res judicata, it was part and parcel of my judgment that the defendant ought not be permitted to re-litigate the same issues that have been litigated in the foreclosure proceedings before [*555] the Seremban High Court. The foreclosure proceedings was distinctly determined and finally adjudicated upon by a court of competent jurisdiction presided over by my brother judge Mohd Noor Abdullah J sitting in the Seremban High Court and his Lordship had on 9 October 1995 granted an order for sale of the land on the application of the plaintiff and the defendant withdrew its appeal against the order for sale on 14 June 1999. The affidavits filed by the defendant in regard to the foreclosure proceedings revealed, as a fact, that there were identical issues raised by the defendant in the foreclosure proceedings as well as in the present proceedings. I need only refer to two affidavits affirmed by Mohd Shamlan bin Ahmad to buttress my points. The first affidavit of Mohd Shamlan bin Ahmad was affirmed on 7 February 1991 in relation to the foreclosure proceedings as seen at p 21 of encl 11 at paras 7-22 thereof, while the second affidavit of the same individual was affirmed on 21 May 1991 in relation to the foreclosure proceedings as seen at p 41 of encl 11 at paras 3-6 and 10 thereof. These two affidavits affirmed in relation to the foreclosure proceedings showed that the doctrine of res judicata must be vigorously applied to the factual matrix of the present appeal. The law journals are replete with authorities on the doctrine of res judicata. These authorities serve as excellent guidelines in understanding the said doctrine. I must now refer to these authorities in succession. For starters, it would be the case of *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494, where that brilliant judge in the person of Abdoolcader SCJ had this to say at pp 498-499 of the report:

> The earlier action instituted by the respondent on 2 July 1985 and which was struck out sought relief on the ground of discrimination in breach of article 8 of the Constitution but in the present proceedings the grounds for relief have been augmented and declarations sought to the effect we have indicated earlier. The appellants plead res judicata in this regard and we think the point is well taken and is supported by authority, and we would refer to the pronouncement of the Privy Council in *Hoystead & Ors v Commissioner of Taxation* [1926] AC 155 and a catenation of cases to the like effect, namely, that the plea of res judicata applies, except perhaps where special circumstances may conceivably arise of sufficient merit of exclude its operation, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.
>
> There is moreover the inherent jurisdiction of the court in cases where res judicata is not strictly established, and where estoppel *per rem judicatum* has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty Ltd v Attorney-General for Queensland* (1979) AC 411, at p 425.
>
> [*556]
>
> The second defence is one of 'res judicata'. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wilgram VC in *Henderson v Henderson* (1843) 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words:
>
> > '…there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings'. (p 590)

This would be followed by the case of *SCF Finance Co Ltd v Masri & Anor (No 3) (Masri, garnishee)* [1987] 1 All ER 194, where Ralph Gibson LJ speaking for the Court of Appeal succinctly said at p 207 of the report:

> But is that issue to be treated as having been decided by virtue of the order dismissing Mrs Masri's application to discharge the Mareva injunction? Before Leggatt J and on this appeal counsel for SCF relied on the principles restated in this court in *Khan v Goleccha International Ltd* [1980] 2 All ER 259, [1980] 1 WLR 1482. In that case an order by consent had been made by the Court of Appeal on the basis of an express acceptance by counsel for the plaintiff borrower that a transaction was not one of moneylending and was outside the scope of the Moneylenders Act 1929. Later the plaintiff brought an action against the defendant company claiming that the debt was statute barred by s 13(1) of that Act. In his judgment, with which Cumming-Bruce and Bridge LJJ agreed, Brightman LJ referred to the express acceptance by counsel before the Court of Appeal that the transaction was not a lending of money, and to the dismissal of the appeal on that basis, and asked 'Does that admission and the consent order so made give rise to estoppel, more particularly to the brand of estoppel sometimes called issue estoppel?' He then continued ([1980] 2 All ER 259 at pp 264-265, [1980] 1 WLR 1482 at pp 1488-1489):
>
> > 'First, for the general principle (*Ord v Ord* [1923] 2 KB 432 at p 439 [1923] All ER Rep 206 at p 210 per Lush J; (I need not narrate the facts): 'The words 'res judicata' explain themselves. If the res — the thing actually or directly in dispute — has been already adjudicated upon, of course by a competent Court, it cannot be litigated again. There is a wider principle, to which I will refer in a moment, often as covered by the plea of res judicata, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the court in the earlier proceedings and which he chose not to put forward …' I turn straight to the wider principle ([1923] 2 KB 432 at p 443, [1923] All ER Rep 206 at 212): 'The maxim *'Nemo debet bis vexari'* prevents a litigant who has had an opportunity of proving a fact in support of his claim or defence and chosen not to rely on it from afterwards putting it before another tribunal. To do that would be unduly to harass his opponent, and if he endeavoured to do so he would be met by the objection that the judgment in the former action precluded him from raising that [*557]
> > contention. It is not that it has been already decided, or that the record deals with it. The new fact has not been decided; it has never been in fact submitted to the tribunal and it is not really dealt with by the record. But it is, by reason of the principle I have stated, treated as if it had been'.

After a reference to the opinion of Lord Wilberforce in *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536 at p 584 [1967] 1 AC 853 at pp 964-965 as to the material at which the court may look in order to identify the issue —

> 'not merely at the record of the judgment relied on, but at the reasons for it, the pleadings, the evidence … and if necessary other material to show what was the issue decided …'

Continuing at p 208 of the report, Ralph Gibson LJ had this to say:

> The decision in *Khan*'s case [1980] 2 All ER 259, [1980] 1 WLR 1482 makes it clear that an order dismissing proceedings is capable of giving rise to issue estoppel even though the court making such order has not heard argument or evidence directed on the merits. If in the present case there had been no attempt expressly to preserve the issue of the beneficial ownership of the dollar account by not conceding it, the effect of Mrs Masri declining to proceed with the hearing and acknowledging that her application must be dismissed, must in our judgment have been finally to determine the issue against Mrs Masri. That effect must have followed because decision of the issue, one way or the other, was the 'necessary step' to the decision which the court would have had to make if the court had proceeded to hear Mrs Masri's application on the merits (see per Lord Wilberforce in *Carl-Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536 at p 584 [1967] 1 AC 853 at p 964 cited by Brightman LJ in *Khan*'s case). If a party puts forward a positive case, as the basis of asking the court to make the order which that party seeks, and than at trial declines to proceed and accepts that the claim must be dismissed, then that party must, in our view, save in exceptional circumstances, lose the right to raise again that case against the other party to those proceedings.

To round it up, Ralph Gibson LJ said at p 209 of the report:

> The principle of the decision of this court in *Khan*'s case is, in our judgment, applicable to this case: a litigant who has had an opportunity of proving a fact in support of his claim or defence and has chosen not to rely on it is not permitted afterwards to put it before another tribunal. In this case, Mrs Masri had her opportunity to establish the case on which her application was based; and she chose not to establish her alleged ownership of the dollar account. Her counsel on her

instructions acknowledged that her application must be dismissed. His attempt to reserve the issue was, in our judgment, ineffective.

In *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 the Privy Council upheld the application by the Supreme Court of Hong Kong of the doctrine of res judicata in the wider sense, namely that it would be an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. Lord Kilbrandon, giving the judgment of their Lordships, gave warning (at 590):

> 'The shutting out of a 'subject of litigation' [was] a power which no court should exercise but after scrupulous examination of all the circumstances [the exercise of such a power] is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, [*558]
> although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule.'

Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, explained the meaning and purport of res judicata in some detail. At pp 197-198 of the report, his Lordship had this to say:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.
>
> Since a res judicata creates an estoppel *per rem judicatum*, the doctrine of res judicata is really the doctrine of estoppel *per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the res judicata is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.
>
> The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 which is:
>
> > 'The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.'

It is correct to say and I so say that all the courts in the world adhere to the principle that there must be an end to litigation: interest reipublicae ut sit finis litium. Cases like *Re May* (1885) 28 Ch D 516 at p 518 (CA); *Re Graydon; Ex parte Official Receiver* (1896) 1 QB 417;*Philips v Bury* (1696) Holt KB 715; *Badar Bee v Habib Merican Noordin & Ors* (1909) AC 615 (PC); *Hoystead & Ors v Commissioner of Taxation* (1926) AC 155 at p 165 (PC); *R v Middlesex JJ, ex parte Bond* (1933) 2 KB 1 (CA); and *Danks v Farley* (1853) 1 WR 291 subscribed to the time honoured principle of putting an end to litigation. The plea of res judicata should succeed where the cause of action is the same (*Hills v Co-operative Wholesale Society Ltd* [1940] 2 KB 435; [1940] 3 All ER 233 (CA)) and that cause of action has been determined on its merits (*Glasgow and South-Western Rly Co v Boyd and Forrest* (1918) SC 14; *Long v Gowlett* (1923) 2 Ch 177 and *Alfred Rowntree & Sons Ltd v Frederick Allen & Sons (Poplar) Ltd* (1935) 41 Com Cas 90).

[*559]

Broadly stated, the doctrine of res judicata can easily be stated and it too can readily be applied to a given situation. For instance, if evidence is led in the second application which is exactly the same as that led in the previous application then the doctrine of res judicata would be vigorously invoked (*Re F(W) (An Infant)* [1969] 2 Ch 269, [1969] 3 All ER 595). Again, if the defendant obtains judgment in a libel action in respect of certain parts of a publication that constitutes a defence of res judicata in respect to a second action especially when the subject

matter of both actions were the same (*Macdougall v Knight* (1890) 25 QBD 1 (CA)), then the defence of res judicata would apply. Having said all these, the present appeal in encl 13 must be governed by the principle of res judicata and that can never be doubted.

The defendant fell into error and was wrong when it submitted that the plaintiff made a further claim on the interest to the sum of RM15,299,680.80 from 9 March 1997 until 3 November 1997 for the sum of RM473,043.18 thereby raising, so said the defendant, the total outstanding sum to RM15,772,723.98. Teh's affidavit in encl 3 at para 21(ii) was self explanatory and it explained the issue of interest once and for all. There, Teh deposed that the interest was calculated on the principal sum of RM7,224,300 from 9 March 1997 to 3 November 1997 calculated at the rate of 10%pa. The particulars of the interest components were nicely explained by Teh in his affidavit in encl 11 at para 8 and there he deposed that when the proceeds of sale totalling RM11,114,975 were applied towards settlement of the accrued debt of principal and interest, the interest element in the global sum of RM8,548,423.98 was completely extinguished, leaving a balance of the principal sum of RM4,657,748,98. The plaintiff categorically said that there was nothing contradictory about the sum of RM4,657,748.98 that appeared at p 9 of Teh's affidavit in encl 11 with the sum of RM5,585,086.12 that appeared at p 13 of Teh's affidavit in encl 3. The sum of RM5,585,086.12 was also itemized as a prayer in the statement of claim and these sums referring to RM4,657,748.98 and RM5,585,086.12 represented the plaintiff's claims against the defendant which were outstanding as at different points of time, namely, on 3 November 1997 and 12 October 1999 respectively.

This was a case just like that of *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 CLJ 31 where there was no necessity at all to proceed to trial. The affidavits together with the relevant documents that were alluded to in the early part of this judgment were sufficient to uphold the decision of the learned SAR in relation to encl 13. The learned SAR rightly entered summary judgment against the defendant in favour of the plaintiff. The present appeal and the facts surrounding it were suitable for summary judgment. There was no necessity for a trial at all. Just like the case of *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim* [1985] 2 MLJ 225, at p 226, a decision of his Lordship Mohamed Dzaiddin J (as he then was and now the Chief Justice of Malaysia), the entire appeal revolved on the facts rather than the law and the defendant had failed, rather miserably, to show a bona fide defence to the plaintiff's claim. This was my judgment and I so hold accordingly.

[*560]

For the reasons adumbrated above, I dismissed the defendant's appeal in encl 13 with costs.

Appeal dismissed.

Reported by Jafisah Jaafar